IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

L.Rs. of late Kapoorchand	vs.	Municipal Boad, Sagwara & Ors.

S.B.Civil Second Appeal No.80/1983 against the judgment and decree dated 17.3.1983 passed by District Judge, Dungarpur in Civil First appeal No.1/1981.

Date of Judgment: January 05,2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr.N.K. Vyas, for the appellants.
Mr.M.Aslam Naushad for Mr. Manish Shishodia for the respondent.

BY THE COURT:

REPORTABLE

Heard learned counsel for the parties.

The appellant is aggrieved against the judgment and decree passed by the trial court dated 10.11.1980 by which in the suit filed by respondent-Muncipal Boad, Sagwara for cancellation of sale-deed dated 24.8.1973 executed by Nirbhay Shanker(defendant no.2) in favour of Kapoor Chand(defendant no.1) was decreed and dismissal of their regular first appeal by the appellate court on 17.3.1983.

This second appeal was admitted by this Court on 7.9.1983 after framing the following substantial question of law:-

> *" What is the effect of the judgment and decree passed in Suit No.4 of 1966-Nirbhay Shankar vs. State and others, decided on 7.12.1970 by the Munsif Magistrate, Sagwara ?"*

It will be worthwhile to mention facts of the earlier suit filed by plaintiff's predecessor in title which is Civil Original Suit No.4/1966. One Nirbhay Shanker claiming himself to be the owner of the plot no.4, filed a suit on 17.1.1966 for possession and in the alternate, for decree for cost of the said plot against the State of Rajasthan, the Muncipal Board, Sagwara, the District Collector, Dungarpur and the Executive Engineer, PWD (B & R). In the said suit No.4/66 Nirbhay Shanker stated that he purchased plot no.4 measuring 50 ft. X 15 ft. for a consideration of Rs.610/- in the year 1964. The officers of the Municipal Board, Sagwara and the Executive Engineer without acquiring the land in question , entered upon the plot of the Nirbhay Shanker and started raising construction of boundary wall. Nirbhay Shanker went on the spot and requested them not to take possession of the plot for the purpose of including the plot in the parks area named as Nehru Park. Since the defendants illegally took possession of the plot, therefore, the plaintiff

served a notice upon said defendants on 14.11.1964. Nirbhay Shanker submitted that though the plot was purchased for a consideration of Rs.610/- but the present market value of the plot is Rs.2500-3000/- but he is claiming cost of the land as Rs.2000/- and Nirbhay Shanker specifically prayed for possession of the plot no.4 and in the alternative prayed for decree of Rs.2000/-which is the cost of the plot. The suit was contested by all the defendants of the suit no.4/66 by filing written statement. The suit no.4/66 filed by Nirbhay Singh was decreed by the trial court vide judgment and decree dated 7.12.1970. The trial court granted alternate relief claimed by the plaintiff Nirbhay Shanker and decreed the suit for the original cost of the plot Rs.610/- instead appriciated cost of plot Rs.2000/- as claimed by Nirbhay Shanker. Copy of the plaint of C.O. No.4/1966 Ex.A.5(c), written statement of the defendant filed in that suit is Ex.A 6(c) and the certified copy of the judgment given in the said suit no.4/66 is Ex.A.7.

The present defendant, by registered sale-deed dated 24.8.1973, purchased the plot no.4 from Nirbhay Shanker inspite of the fact that the civil court in regular instituted suit filed by none else than Nirbhay Shankar himself already declared that the plaintiff is not entitled for the possession of plot no.4 and he is entitled for the cost of the plot no.4 that too amounting to Rs.610/- only. This fact of purchase of plot by defendant no.1 came in the knowledge of the Municipal Board, Sagwara

only on 27.5.1974 when the present defendant no.1 gave reply to the notice of the plaintiff-Municipal Board. The plaintiff-Municipal Board was advised to file suit for cancellation of the sale-deed dated 24.8.1973 executed by said Nirbhay Shanker in favour of present defendant no.1. Therefore, suit for cancellation of the sale-deed was filed by the Municipal Board, Sagwara on 23.8.1976 with a prayer that the plot described in the map measuring 50 ft. X 15 ft. may be declared to be plaintiff's plot and the sale-deed dated 24.8.1973 is null and void against the interest of the Municipal Board, Sagwara. The defendant no.1 submitted written statement in the present suit and pleaded that the land measuring 50 ft. X 15 ft. was purchased by him from Nirbhay Shanker. He also stated that the said land remained in possession of Nirbhay Shanker since 16.11.1957 when he purchased the land and thereafter the land of plot no.4 came in the ownership and possession of defendant no.1.

There is no need to mention other facts which are not very much relevant as facts mentioned are not in dispute and this Court framed the issue only about the effect of the judgment and decree passed in the suit no.4/66-Nirbhay Shanker vs. State & ors. decided on 7.12.1970. According to the learned counsel for the appellants, the appellant-defendant no.1 is bona fide purchaser of the plot no.4. Nirbhay Shanker

filed suit no.4/66 only for the land measuring 5 ft. x 20 ft. which was encroached upon by the Municipal Board, Sagwara and, therefore, the remaining land remained with Nirbhay Shanker for which Nirbhay Shanker executed sale-deed in favour of the present defendant no.1 on 24.8.1973. Therefore, the present defendant no.1-appellant became the owner of the said land. It is also submitted by the learned counsel for the appellants that the appellant is not bound by the decree dated 7.12.1970 as the appellant was not party in suit no.4/66 filed by Nirbyay Shanker. It is also submitted that the decision which is not inter-party, is not binding. For this proposition, the learned counsel for the appellants relied upon the judgment of the Patna High Court reported in the cases of Prahlad Chandra Singh v. Bhim Mahto and others (AIR 1940 Patna 341) and Mst. Asa Bai v. Prabhulal and others (AIR 1960 Raj. 304). The learned counsel for the appellants also submitted that a plea which has not been decided in earlier suit, cannot be res judicata in subsequent suit. In suit no.4/66, the issue was not involved about the exact measurement of the land encroached upon by the Municipal Board, Sagwara or other defendants, therefore, this issue was open for decision in the present suit. The learned counsel for the appellants relied upon the judgment of the Privy Council reported in the case of Midnapur Zamindari Co., v. Naresh Narayan Roy (AIR 1922 Privy Council 241).

The learned counsel for the respondents vehemently supported the judgments of the courts below and submitted that when Nirbhay Shanker had no title on 24.8.1973, no right can devolve upon him or pass on in favour of defendant no.1,on execution of sale-deed by Nirbhay Shanker in favour of defendant no.1. Therefore, the sale-deed dated 24.8.1973 is null and void and is of no effect against the interest of the Municipal Board, Sagwara nor it conveys any title to defendant no.1. It is also submitted that the present appellant-defendant no.1 can stand only in the shoes of Nirbhay Shanker being transferee from him and, therefore, he cannot have better right than Nirbhay Shanker and the judgments relied upon by the learned counsel for the appellants have no application to the facts of the case. It is also submitted that Nirbhay Shanker filed the suit with specific and gave full measurement of the plot that defendants encroached upon and Nirbhay Shanker sought decree for the enhanced cost of the entire plot and not for part of the land. Therefore, neither Nirbhay Shanker nor his successor can now say that the entire plot was not involved in the Civil Original Suit No.4/66.

I considered the submissions of the learned counsel for the parties and perused the record. In the plaint, Nirbhay Shanker very specifically stated about the measurement of the plot and cost of the entire plot

which he paid and which is Rs.610/- and price of the land as on the date of filing of the suit which is Rs.2500-3000/-and thereafter, Nirbhay Shanker claimed that either possession be delivered to Nirbhay Shanker or cost of the entire plot amounting to Rs.2000/- be decreed in favour of Nirbhay Shanker. However, the learned Munsif Magistrate, Sagwara, after considering the issue about the cost of the plot on issue no.6, held that the plaintiff is entitled to the cost of the entire plot as Rs.610/- only and not Rs.2000/-. Therefore, entire land of the plot no.4 was the subject matter of the suit no.4/66 Nirbhay Shanker accepted the judgment and decree of the trial court dated 7.12.1970 as no appeal was preferred by him. In the judgment and decree of the trial court dated 7.12.1970 it is clearly mentioned that Nirbhay Shanker is not entitled for possession of the plot in dispute which has already been included in the Nehru Park Scheme and he is entitled only for price of Rs.610/-, which he paid and which is Rs.610/- only. Therefore, after 7.12.1970, Nirbhay Shanker had no right over the plot in dispute particularly against the Municipal Board, Sagwara and he had no salable rights, therefore, the sale-deed dated 24.8.1973 executed after the decision in the Civil Original Suit No.4/66 is of no effect against the interest of the respondent-Municipal Board, Sagwara or the defendants of suit no.4/66.

The argument has been advanced by the learned counsel for the

appellants relying upon the judgments on misconception of law because of the fact that the law laid down by all above judgments have no relevance to the facts in this case because it is not a case where the judgment passed between the two parties is sought to be used against a total stranger person. The judgment delivered in the suit no.4/66 is binding upon the defendant(deceased) who is claiming derivative title from Nirbhay Shanker, the plaintiff in suit no.4/66. Therefore, the substantial question of law is decided against the appellant.

In view of the above discussion, I do not find any merit in this appeal. Hence the appeal of the appellant is dismissed. No order as to costs.

(**PRAKASH TATIA),J.**

mlt.